IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1649

LLOYD F. EARLY, *Petitioner*

v.

PALM BEACH NEWSPAPERS, INC., GREGORY E. FAVRE, ROBERT H. KIRKPATRICK, JANE ARPE and TOM SAWYER, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA, FOURTH JUDICIAL DISTRICT

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Lloyd F. Early, by and through his counsel, hereby petitions for a writ of certiorari to review the divided decision below of the Supreme Court of the State of Florida which leaves standing a reversal by the Florida District Court of Appeal, Fourth District, of a jury verdict and judgment favorable to Petitioner.

OPINIONS, ORDERS AND JUDGMENT BELOW

The order of the Supreme Court of the State of Florida declining to entertain jurisdiction either by way of appeal or on petition for a writ of certiorari, including the dissenting opinion thereto (App. A, *infra*), is not yet reported. Similarly, the Florida Supreme Court's order denying rehearing (App. B, *infra*) is unreported. The *per curiam* opinion of the

Florida District Court of Appeal, Fourth District, reversing a jury verdict in Petitioner's favor (App. C, *infra*), is reported at 334 So.2d 50 (Fla. 4 DCA 1976). That court's denial of rehearing (App. D, *infra*) is unreported. The judgment for Petitioner entered in the Circuit Court of the 17th Judicial Circuit of Florida, Broward County (App. E, *infra*), is not reported; nor is the trial court's memorandum decision denying defendants' several post-trial motions (App. F, *infra*).

JURISDICTION

The order of the Supreme Court of Florida issued on May 31, 1977 (App. A, *infra*). On December 22, 1977, the Florida Supreme Court denied a petition for rehearing (App. B, *infra*). On March 14, 1978, Mr. Justice Powell extended the time for filing the present petition for a writ of certiorari to and including May 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the reversal below of a jury verdict in Petitioner's favor was premised on a misapplication of the standard announced by this Court in *New York Times* v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710 (1964), so as to unconstitutionally deprive Petitioner of due process of law and the judgment he had properly obtained pursuant to a jury verdict in the trial court.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment 1:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . .

U.S. Constitution, Amendment XIV, Sec. 1:

> . . . Nor shall any state deprive any person of life, liberty or property, without due process of law . . . .

STATEMENT

On August 5, 1970, Lloyd F. Early instituted the present action in the Circuit Court for Palm Beach County, Florida, against Palm Beach Newspapers, Inc. and four named reporters for one or another of the defendant company's three newspapers distributed throughout the Palm Beach area. The gravamen of the complaint was that over a period of some 14 months Respondents had persistently pursued a malicious newspaper campaign designed to force the removal of Petitioner from his elected position as Superintendent of Schools for Palm Beach County, Florida. Respondents admitted in print that "disposing of Lloyd Early is priority business". Respondents were charged with writing and publishing literally hundreds of derogatory articles (including a number of pejorative cartoons) which contained knowingly false and defamatory information about plaintiff's character, behavior, competence, actions and business relationships, all done with malice and in reckless disregard of the truth.

Following a reassignment of the case to the Circuit Court for Broward County, Florida, the matter was, by agreement of the parties, tried before a jury under the review standard announced by this Court in *New York Times* v. *Sullivan, supra.* The numerous newspaper articles and cartoons in question were placed into evidence, and substantial testimony was introduced to support Petitioner's assertion that Respondents had intentionally undertaken a campaign to de-

stroy public confidence in him as the Superintendent of Schools, and had dogmatically pursued that objective by knowingly publishing false information in reckless disregard of the truth, as stated by the trial judge in denying Respondents' post trial motions (See App. F, *infra*, p. 16a). After two weeks of trial, the court thoroughly instructed the jury on the law of libel in relevant part as follows:

> . . . You are instructed that as a public official, if you find by the evidence that any of these articles about a public official are libelous[;] that the official, the plaintiff, and [*sic*] if you find he has proven by clear and convincing evidence that the material was false and libelous, you must also prove by clear and convicing evidence that the defendants whom you may find against either published the material with actual knowledge that the material was false or published it with a reckless disregard for its truth or falsity.
>
> Reckless disregard, as the Courts have said, reckless disregard for truth or falsity means the defendants published the material with a high awareness of [*sic*] it was probably false or they had serious doubts about the truth of it when they published it. [Trial Tr. 1964-65].

The jury returned a verdict in favor of Petitioner in the amount of $950,000.00 compensatory damages, $25,000.00 punitive damages against Respondent Kirkpatrick and $25,000.00 punitive damages against Respondent Favre (see App. E, *infra*). Respondents then filed a series of post-trial motions seeking, alternatively, a mistrial, a judgment notwithstanding the verdict and a new trial. By order and memorandum decision issued on November 19, 1974, the trial court denied all three requests, stating *inter alia*:

> The Court further finds that the Plaintiff carried his burden of proof under the *New York Times* standard and proved his case by the clear and convincing weight of the evidence. *There is ample evidence in the record from which the jury could reasonably conclude that the Defendants clearly engaged in a campaign to "get" the Plaintiff. There was sufficient and substantial evidence from which a jury could reasonably conclude that many of their articles were published knowing of their falsity or with a high degree of awareness of their probable falsity.* [App. F, *infra*, p. 16a; emphasis added].

The Fourth District Court of Appeal of Florida reversed (App. C, *infra*). Acknowledging that "most of the articles and cartoons can fairly be described as slanted, mean, vicious, and substantially below the level of objectivity that one would expect of responsible journalism" (*id.* at 13a), the appeals court nonetheless absolved the Respondents of liability on the rationale that the defamatory information was in the nature of editorial opinions rather than factual reporting, and accordingly was entitled to a "free press" protection under the First Amendment of the Constitution regardless of how purposefully false or misleading the statements were (*id.* at 9a, 13a). To support its conclusion, the Florida District Court of Appeal selected "a smattering of the several hundred derogatory articles and cartoons" involved (*id.* at 13a), refused to recognize their significance, and rationalized the false and reckless materials on the grounds that they were either: (a) "matters of opinion, not statements of fact" (*id.* at 11a); (b) not as devastating an indictment of Petitioner's character when read in context as the language used might imply (*id.*); (c) "caustic and pejorative"

but with "a basis in fact and thus . . . not false" (*id*); (d) false, but only as a result of "defendants failure to investigate" (*id.* at 12a); or (e) "in the category of what the courts have chosen to call 'rhetorical hyperbole'" (*id.* at 13a).

Petitioner promptly petitioned for rehearing, arguing, *inter alia,* that the District Court of Appeal had failed to accord proper deference to the jury verdict, had ignored substantial evidence in the record supporting that verdict in reaching a contrary conclusion, and had, moreover, misapplied the *New York Times* v. *Sullivan* standard to overturn the verdict below. The petition for rehearing was denied on June 2, 1976 (App. D, *infra*). Thereafter, Petitioner sought review in the Supreme Court of Florida either by way of appeal or on petition for a writ of certiorari. On May 31, 1977, the Florida Supreme Court declined to entertain jurisdiction (App. A, *infra*). A petition for rehearing was timely filed by Petitioner, but this was also denied by the Florida Supreme Court by order dated December 22, 1977 (App. B, *infra*).

Petitioner now seeks review by this Court in the present petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The reversal by the Fourth District Court of Appeal of Florida of a jury verdict in Petitioner's favor is based on a misapplication of this Court's decision in *New York Times* v. *Sullivan, supra.* The Fourth District Court of Appeal's decision is at variance with both the letter and spirit of *New York Times* v. *Sullivan, supra,* and is at variance with the numerous federal and state libel cases that have since reaffirmed the principles first announced therein. By exonerating the

Respondent newspapers and their reporters of responsibility for the calculated destruction of Petitioner's career through a "slanted", "mean" and "vicious" media campaign "admittedly designed to bring about the removal of Mr. Early from his elected position" (App. C, *infra,* 8a and 13a), the challenged decision has effectively bestowed upon the press the very "unconditional freedom" to criticize public officials that was urged *without success* in the concurring opinion in *New York Times* v. *Sullivan, supra,* 376 U.S. 293-305, 84 S. Ct. 733-39, and has consistently been rejected in this Court's subsequent rulings. See, *e.g., Rosenbloom* v. *Metromedia,* 403 U.S. 29, 52, 91 S. Ct. 1811, 1824 (1971); *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 348-49, 94 S. Ct. 2997, 3011 (1974).

Such an erosion and depreciation of the legal principles that have controlled libel cases as presented herein warrants full review on writ of certiorari. See Rule 19(1)(a) of the Rules of the Supreme Court of the United States.

The Florida District Court of Appeal has granted an absolute protection to libelous news commentary, no matter how vilifying or false, which can arguably fit within the category of editorial opinion rather than reportorial fact. Such a decision, if allowed to stand, is contrary to prior decisions of this Court and will undoubtedly serve to encourage further an emerging trend in this country towards irresponsible journalism, thereby tending to undermine, rather than to promote, the public's right to a wide-open but responsible debate on public issues in search for the truth about public affairs. That is, of course, the very essence of the First Amendment guarantee of a free press. See, *e.g., Thornhill* v. *Alabama,* 310 U.S. 88, 102, 60 S. Ct.

736, 744 (1940); *Rosenbloom* v. *Metromedia, supra,* 403 U.S. 41-42, 91 S. Ct. 1818; *St. Amant* v. *Thompson,* 390 U.S. 727, 732, 88 S. Ct. 1323, 1326 (1968).

One predictable consequence of removing all publishing accountability and responsibility will be that public officials will, out of caution, be chilled in the exercise of their public duties and in their public statements, lest they incur the displeasure of newspapers and news commentators and thus become the target of a campaign similar to that engaged in by the Palm Beach newspapers in the present case. Once aware that newspapers can publish, in news columns and with impunity under the guise of editorial opinion, defamatory material which is intentionally or recklessly false and misleading, public officials will inevitably be chilled and engage in self-censorship; the obvious result will be less free and open debate of public issues.

Certainly, if the libelous conduct here is not actionable, it is unlikely that there will ever be a recovery for libel and slander regardless of how outrageous the false and reckless publication may be. This point was well made by the trial court in denying Respondent's post-trial motions:

> The New York Times and succeeding cases have placed a heavy burden upon any public figure who claims a cause of action for libel. *If the protective umbrella of the New York Times and succeeding cases extends over Defendants who have acted as have Defendants in this cause, I would have to conclude that public officials are completely barred from successful libel actions.* . . . The Defendants' attorneys, in both their briefs and their oral argument, have frequently quoted the well known saying of the late President Truman with reference

> to politicians and their sensitivity to criticism, "If you can't stand the heat, stay out of the kitchen". *Certainly, public figures inure themselves to a reasonable amount of heat. However, a Defendant cannot set fire to a building and then claim the cook has no right to complain of the heat.* [App. F, *infra,* at 17a; emphasis added].

As this Court knows full well, the majority opinion in *New York Times* v. *Sullivan, supra,* carefully stopped short of absolving newspapers and reporters from all responsibility for false and misleading statements about public officials.[1] Without in any respect compromising the First Amendment protection accorded to the press (*New York Times* v. *Sullivan, supra,* 376 U.S. 268-80, 84 S. Ct. 719-26), the Court declared its milestone opinion in clear terms that the news media could, and indeed should, be held accountable for libelous and defamatory falsehoods relating to official conduct where it could be shown "that the statement[s] [were] made with 'actual malice'—that is, with knowledge that [they were] false or with reckless disregard of whether [they were] false or not" (376 U.S. 279-80, 84 S. Ct. 726). See also *St. Amant* v. *Thompson, supra,* 390 U.S. 731, 88 S. Ct. 1325. To allow the decision of the Florida District Court of Appeal to stand is to seriously undermine the milestone decision of *New York Times* v. *Sullivan, supra.*

Notably, this controlling standard was *not* announced in qualifying terms which excused malicious reporting that could be classified as editorial opinion, while leaving vulnerable to attack intentional defamatory falsehoods said to be only reportorial and factual in nature.

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[1] See also *Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at 341-42, 94 S. Ct. at 3007-09.

Compare *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 95 S. Ct. 465 (1974). Indeed, the very context in which *New York Times* v. *Sullivan* was decided belies any such formalistic distinction. There, the Court had before it what could only be characterized as an "editorial advertisement", *i.e.*, one which "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support . . ." (376 U.S. 266, 84 S. Ct. 718). Certainly, if a showing of "actual malice" in that case would have provided a basis for recovery against intentional or reckless falsehoods expressed through the medium of advertising, so, too, should the reporters and publishers in the present case be held accountable for their defamatory cartoons and editorials which, as proven below, they either knew or should have known lacked a foundation in truth.

For it is neither the form (*i.e.*, opinion vs. fact) nor the character (*i.e.*, truth vs. falsity) of expression that is a measure of the constitutional protection afforded to defamatory remarks by the press corps (see *New York Times* v. *Sullivan*, 376 U.S. 271-79, 84 S. Ct. 721-25). Rather, the test is whether the statements made or opinions given were done with actual malice as defined by this Court. Therefore, the First Amendment safeguards for free and open criticism by the press of public officials do not provide an absolute haven against an award of damages in actions for libel and slander.

This conclusion is fully supported by the more recent decisions by this and other courts. The several opinions in *Rosenbloom* v. *Metromedia, supra*, demonstrate clearly the lack of concern that this Court has had with regard to whether the defamatory falsehoods might be characterized as opinion or fact. As Mr. Justice Brennan concluded for the *Rosenbloom* plurality "*all discussion and communication* involving matters of public and general concern" (403 U.S. 44, 91 S. Ct. 1820; emphasis added) must meet the test enunciated in *New York Times* v. *Sullivan, supra.*

Thus, news articles designed to place the subject in a "false light" by sprinkling factual reports with derogatory editorial comment have been held to be actionable conduct. See *Cantrell* v. *Forest City Publishing Co., supra; Varnish* v. *Best Median Publishing Co.*, 405 F.2d 608, 611-12 (2d Cir. 1968), *cert. denied,* 394 U.S. 987, 89 S. Ct. 1465 (1969). Similarly susceptible to attack are newspaper campaigns aimed at maligning the character of a public official through false innuendo, accusation and influence. See *Ginzburg* v. *Goldwater,* 414 F.2d 324 (2d Cir. 1969), *cert. denied,* 396 U.S. 1049, 90 S. Ct. 1085 (1970); *Ragano* v. *Times, Inc.,* 302 F. Supp. 1005, 1010 (D.C. Fla. 1969), *affirmed,* 427 F.2d 219 (5th Cir. 1970); *Clay Communications, Inc.* v. *Sprouse,* 211 S.E.2d 674 (W. Va. Sup. Ct. 1974), *cert. denied,* 423 U.S. 882, 96 S. Ct. 145 (1975). Moreover, where such character assassinations have been undertaken without first making a reasonable effort to investigate the truth or falsity of the underlying charges, and they are shown to be irresponsibly false, the First Amendment protection has been recognized as unavailing. See, *e.g., Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 157-58, 87 S. Ct. 1975, 1992 (1967).

The decision by Respondents to "get" Lloyd Early, embarked them on a zealous program of excessive publication demonstrating Respondents' failure to investigate properly despite having serious doubts regarding the truthfulness of their publications. "Publishing

with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice". *St. Amant* v. *Thompson, supra,* 731.

Contrary to the decision of the Florida District Court of Appeal below (App. C, *infra,* at 9a-10a), this Court's opinion in *Gertz* v. *Robert Welch, Inc., supra,* does not suggest that the foregoing line of authority has no application to cartoons or editorial opinion. Even though Mr. Justice Powell stated that "[u]nder the First Amendment there is no such thing as a false idea" (418 U.S. 340, 94 S. Ct. 3007), that certainly does not provide newspapers with a license to denigrate the character of public officials by expressing defamatory opinions which are known to be without factual basis and depend for their pronouncement on a reckless disregard for truth. As this Court observed in *Garrison* v. *State of Louisiana,* 379 U.S. 64, 75, 85 S. Ct. 209, 216 (1964), a case involving personal attacks through the press on the integrity and honesty of a number of judges:

> Calculated falsehood falls into that class of utterance which "*are of no essential part of any essential part of any exposition of ideas,* and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." . . . *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L.Ed. 1031. *Hence, the knowingly false statements made with reckless disregard of the truth, do not enjoy constitutional protection.* [Emphasis added].

It is from this perspective that we urge review by this Court of the present case. That the Palm Beach newspapers "through their respective *editorial and*

news reporters, embarked upon a concerted campaign admittedly designed to bring about the removal of Mr. Early from his elected position" (App. C, *infra,* at 8a; emphasis added) is not a matter of dispute. Nor is it questioned that "[i]n pursuance of this objective, the defendants published over a period of approximately fourteen months several hundred *news articles and editorials,* all of which were generally hostile to or critical of Mr. Early *and many of which were of a defamatory nature*" (*id.;* emphasis added). In describing the tactics used, the Florida District Court of Appeal specifically stated that "most of the articles and cartoons can fairly be described as slanted, mean, vicious and substantially below the level of objectivity that we would expect of responsible journalism . . ." (App. C, p. 13a).

The jury, under proper instructions derived from the standard in *New York Times* v. *Sullivan, supra,* found as a fact that the campaign was carried out with "actual malice". There was more than sufficient evidence introduced to show that the articles discussing Petitioner's "*ineptness, incompetence* and *indecisiveness*" (App. C, *infra,* at 11a; emphasis in original)—whether viewed as "matters of opinion" or "statements of fact" (*id.*)—were utterly without factual basis. The references to Mr. Early "*cheating*", "*stealing from the public*" and having his "*fingers in the pot*" (*id.*; emphasis in original)—whether understood as connoting "thievery" or "incompetent intervention" (*id.*)—were also shown at trial to be false. Similarly, specific news stories and cartoons which the Florida District Court of Appeal recognized as "caustic and pejora-

tive" (*id.*) were entirely inaccurate.[2] The same can be said for the "series of articles [accusing] plaintiff of nepotism" (App. C, *infra,* at 12a). Indeed, as to this latter matter, the chairman of the school board, to whom the charge of nepotism was attributed, testified not only that he was neither the source of, nor a contributor to, these stories, but that the reporters who interviewed him had suggested and pressed the charge of nepotism during the interview; and then had subsequently attributed their own remark regarding nepotism to the school board chairman. Such reckless disregard for the truth cannot properly be dismissed, as did the court below (*id.*), as nothing more than "defendants' failure to investigate".

In sum, it is a clear case of misapplication of federal law that we bring to this Court. In addition to the "smattering" (App. C, *infra,* at 13a) of articles reviewed by the Florida District Court of Appeal, there were hundreds of other articles falsely accusing Mr. Early of misdeeds ranging from incompetence to theft

[2] The trial judge so found in precise terms: "There was sufficient and substantial evidence from which a jury could reasonably conclude that many of their articles were published knowing of their falsity or with a high degree of awareness of their probable falsity" (App. F, *infra,* at 16a). Thus, at no time did the school board strip Mr. Early of his power; the reference to Mr. Early as a "former trucker" was false and misleading; the criticism with regard to Mr. Early's use of educational TV was by no means limited to his speech to school employees, but was widespread and in almost all respects unfounded; the reports and cartoons relating to what was represented to be Mr. Early's planned firing of four hundred members of the instructional staff were totally without factual basis. The same can be said for the articles and cartoons dismissed by the Florida District Court of Appeal as mere "rhetorical hyperbole". The evidence confirmed that the only individuals "clamoring for new leadership in the school system" (App. C, *infra,* at 13a) were the reporters themselves, not the public at large as the articles implied.

which the jury examined to ascertain whether the campaign against this Petitioner was conducted with actual malice and in reckless disregard for the truth. The triers of fact were so persuaded in this regard that they returned a verdict not only for compensatory damages, *but for punitive damages as well* (App. E, *infra*). The soundness of this determination was fully confirmed by the trial judge who had equal exposure to all the documents introduced and all the testimony offered (App. F, *infra*). His conclusion bears repeating:

> If the protective umbrella of the New York Times and succeeding cases extends over Defendants who have acted as have the Defendants in this cause, I would have to conclude that public officials are completely barred from successful libel actions. [App. F, *infra* at 17a].

We agree with that assessment. The reversal of this case by the Florida Court of Appeal depends largely on their erroneous conclusion that editorial opinion, even when mixed with news stories, enjoys a constitutional protection under the First Amendment that is not accorded to merely factual reporting by newsmen. If this Court had intended *New York Times* v. *Sullivan, supra,* to be so interpreted, it is unthinkable that a showing of "actual malice" would have been adopted as the touchstone for liability in libel cases involving public officials. That standard necessarily contemplates reporting which is "opinionated", rather than objective. It requires a showing that the press has purposefully "slanted" the facts in a manner which is known to be false, or which is recklessly indifferent to the truth. Such is precisely the showing that was made by Petitioner in the present case, and the reversal below of his jury award for compensatory and punitive

damages resulting from Respondents' "slanted, mean, vicious" and admittedly irresponsible newspaper campaign (App. C, *infra,* at 13a) is constitutionally impermissible. See U.S. Constitution, Article XIV, Section 1.

The Fourth District Court of Appeal incorrectly concluded that under present law only a false statement of fact made with "actual malice" could suffice for a libel action brought by a public official. We contend that is not the law as stated by this Court, and that this misapplication of *New York Times* v. *Sullivan, supra,* and its progeny provides a basis for future claims of absolute immunity by newspapers, a concept which this Court has rejected as unacceptable.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 20, 1978

APPENDIX

APPENDIX A

SUPREME COURT OF FLORIDA

TUESDAY, MAY 31, 1977

Consolidated Cases
49,650 (appeal)

CASE Nos. 49,625 (certiorari)

DISTRICT COURT OF APPEAL, FOURTH DISTRICT

74-1729—75-116

LLOYD F. EARLY, *Appellant, Petitioner,*

vs.

PALM BEACH NEWSPAPERS, INC., ETC., ET AL.,
Appellees, Respondents.

The Court having determined that it is without jurisdiction, it is ordered that the appeal, case no. 49,650, be and is hereby dismissed sua sponte.

Case No. 49,625 having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

Vote for case no. 49,650 (appeal):

OVERTON, C.J., ADKINS, BOYD, ENGLAND, SUNDBERG, AND HATCHETT, J.J., CONCUR.

Vote for case no. 49,625 (certiorari):

OVERTON, C.J., BOYD, ENGLAND, SUNDBERG, AND HATCHETT, J.J., CONCUR. ADKINS, J., DISSENTS WITH OPINION.

A True Copy

TEST:

/s/ Sid J. White
Clerk Supreme Court.

ADKINS, J., dissenting.

Conflict does exist with several decisions cited by the petition, and accordingly this Court should exercise its discretion and assume jurisdiction of the cause to resolve the conflict and to dispose of the issues on the merits.

Petitioner, elected County Superintendent of Public Instruction of Palm Beach County, was successful in the trial court in an action for libel against respondents. A jury verdict awarded him $1,000,000 in compensatory and punitive damages, and final judgment was entered thereon. As appears from the District Court of Appeals, Fourth District, decision under review, respondents, two daily newspapers in Palm Beach, their editors and a reporter from each, embarked upon a concerted campaign admittedly designed to bring about the removal of Mr. Early from his elected position, and, in pursuance of said objective, published over a period of approximately fourteen months several hundred news articles and editorials, all of which were generally hostile to or critical of Early and many of which were defamatory.

In an order denying respondents' motion for new trial, motion for mistrial and motion for J.N.O.V., the trial court explained:

> "The court finds that the jury was properly instructed relative to the defendants' privilege under the doctrine enunciated in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) and its progeny of cases. The court further finds that the plaintiff carried his burden of proof under the *New York Times* standard and proved his case by the clear and convincing weight of the evidence. There is ample evidence in the record from

> which the jury could reasonably conclude that the defendants clearly engaged in a campaign to 'get' the plaintiff. There was sufficient and substantial evidence from which the jury could reasonably conclude that many of their articles were published knowing of their falsity or with a high degree of awareness of their probable falsity."

Upon appeal, the District Court of Appeal, Fourth District, reversed on the ground that the petitioner had not carried his burden of showing by clear and convicing evidence that the defamatory statements were made with knowledge of their falsity.

Petitioner submits that the subject District Court of Appeal, Fourth District, decision creates a new rule of law which permits the District Court to reweigh the evidence, retry the case, and generally substitute its judgment for that of the trial court. The Fourth District Court's decision does conflict with several decisions cited by petitioner to the effect that an appellate court is not free to substitute its judgment for the trier of fact or to reweigh the evidence and reach a different conclusion than the trial court, *Crane & Crouse, Inc.* v. *Palm Bay Towers Corp.*, 326 So.2d 182 (Fla. 1976), and to the effect that the existence or nonexistence of malice where the facts are controverted and there is evidence on the subject is a jury question. *Coogler* v. *Rhodes*, 21 So. 109 (Fla. 1897), *Montgomery* v. *Knox*, 3 So. 211 (Fla. 1887), *Myers* v. *Hodges*, 44 So. 357 (Fla. 1907), *Firestone* v. *Time, Inc.*, 305 So.2d 172, cert. granted 95 S.Ct. 1557.

Cape Publications, Inc. v. *Adams*, —— So.2d —— (Fla. 4th DCA), opinion filed August 27, 1976, was an appeal from substantial verdicts and judgments in a libel action. In considering the evidence "in the light most favorable to the verdict," the court held that there was

> "[C]lear and convincing support for a finding that appellant exhibited a reckless disregard of whether the charges were true or false, i.e., that they published the articles with a high degree of awareness of the probable falsity of the statements involved."

In the case *sub judice*, the defendants accused plaintiff of "cheating," and "stealing from the public," and that he had his "fingers in the pot." The District Court recognized that these charges, if false and made with knowledge with such falsity or with reckless disregard of the truth thereof, would be actionable. The court then said:

> "However, in proper context the statements which defendants actually made do not carry the implication suggested by plaintiff. The first article referred to an editorial in which the newspaper asserted that the public and the school board had been *cheated by Mr. Early's lack of leadership,* while the second article stated in an editorial that 'Mr. Below sits on the sideline doing what he can when Mr. Early's fingers aren't in the *pot'—implying not thievery, but incompetent intervention* in the operation of the school system. Taken in proper context, no reader of the newspaper articles could have thought that the newspaper was charging Early with the commission of any criminal offense."

The question of whether a reader of the newspaper thought that the newspaper was charging plaintiff with the commission of a criminal offense was clearly a jury question. In this respect the District Court substituted its judgment for that of the jury and the trial judge. If statements which are published have a different effect on the common mind of the reader than that which the truth would have, then the jury is authorized to return a verdict for the plaintiff. *McCormick* v. *Miami Herald Publishing Co.,* 139 *Co.,* 139 So.2d 197, 200 (Fla.2d DCA 1962); *Hammond* v. *Times Publishing Co.,* 162 So.2d 681, 682 (Fla.2d DCA

1964); *Layne* v. *Tribune Company,* 146 So. 234, 238 (Fla. 1933); *Johnson* v. *Finance Acceptance Co.,* 159 So. 364 (Fla. 1935); *Joopanenco* v. *Gavagan,* 67 So.2d 434 (Fla. 1953); *Campbell* v. *Jacksonville Kennel Club,* 66 S.2d 495 (Fla. 1953); *Commander* v. *Pedersen,* 156 So. 337 (Fla. 1934).

There is clear conflict and we should assume our responsibility and accept jurisdiction.

APPENDIX B

THURSDAY, DECEMBER 22, 1977

(CAPTION OMITTED IN PRINTING)

On consideration of the petition for rehearing filed by attorneys for petitioner/appellant,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

OVERTON, C.J., BOYD, ENGLAND, SUNDBERG and HATCHETT, JJ., Concur. ADKINS, J., Dissents.

A True Copy

TESTS:

/s/ SID J. WHITE
Clerk Supreme Court

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM, 1976

CASE NOS. 75-116, 74-1729

PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE, *Appellants,*

v.

LLOYD F. EARLY, *Appellee.*

Opinion filed April 23, 1976.

Consolidated appeals from the Circuit Court for Broward County; Victor O. Wehle, Judge.

Harold B. Wahl of Wahl and Gabel, Jacksonville, Cecil H. Albury of Brennan, McAliley, Albury and Hayskar, West Palm Beach, and John F. Law, North Palm Beach, for appellants.

Joseph D. Farish, Jr. of Farish & Farish, West Palm Beach, for appellee.

PER CURIAM.

Lloyd F. Early, the elected County Superintendent of Public Instruction of Palm Beach County, brought an action for libel against Palm Beach Newspapers, Inc., the publisher of two daily newspapers, and certain members of the editorial and news staff of those two newspapers. A jury verdict awarded Early a total of $1,000,000 in compensatory and punitive damages, and from the judgment entered thereon the defendants have appealed. This is Case No. 74-1729. The trial has been delayed for nearly two years while defendants sought certiorari review of an order requiring the corporate defendant to disclose certain financial

information. Defendants had posted a bond conditioned to pay all costs and damages occasioned by the delay. Subsequent to verdict and final judgment, plaintiff sought to recover on the bond asserting entitlement to two years' interest on the judgment as his damages for the delay. The postjudgment order denying plaintiff's motion and granting the defendants' motion to discharge the bond is the subject of an interlocutory appeal, Case No. 75-116. We affirm the latter order, and, for reasons hereafter set forth, reverse, the judgment in Case No. 74-1729.

At all times material to this cause of action, Lloyd F. Early was a public official. The corporate defendant published two daily newspapers in Palm Beach County, the Palm Beach Post, a morning paper, and the Palm Beach Times, an evening paper. Defendants-Favre and Sawyer were editor and reporter respectively for the Post, defendants—Kirkpatrick and Arpe editor and reporter respectively for the Times. Both papers, through their respective editorial and news staffs, embarked upon a concerted campaign admittedly designed to bring about the removal of Mr. Early from his elected position. In pursuance of this objective, the defendants published over a period of approximately fourteen months several hundred news articles and editorials, all of which were generally hostile to or critical of Early and many of which were of a defamatory nature.

Although the defendant/appellants have raised a number of points on this appeal, we find merit only as to those relating to (1) the sufficiency of the evidence, (2) the correctness of certain jury instructions, and (3) the gross excessiveness of the verdict. However, because we conclude that the evidence is legally insufficient to sustain the verdict and the judgment entered thereon, we dispose of the case on that point alone, making it unnecessary to discuss the remaining meritorious points.

This case is governed squarely by New York Times Company v. Sullivan, 376 U.S. 254 (1964) and its progeny. In the *New York Times* case, the court defined a constitutional privilege intended to free criticism of public officials from the restraints imposed by the common law of defamation:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. at 279-80)

This standard, applicable to appellee—Lloyd F. Early as a public officer, has been explicated in later cases. In Garrison v. Louisiana, 379 U.S. 64 (1964), it was said, at 74, "only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions." As stated in a footnote in Gertz v. Robert Welsh, Inc., 418 U.S. 323 (1974) (footnote 6 at 334):

> "In St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968), the Court equated reckless disregard of the truth with subjective awareness of probable falsity: 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'"

Malice in the traditional common law sense of sinister or corrupt motive such as hatred, ill will, spite, enmity or a wanton desire to injure has been distinguished from actual malice as employed in the *New York Times* standard relating to a public official—knowledge of falsity or reckless disregard of the truth. See, Beckley Newspapers Corp. v.

Hanks, 389 U.S. 81 (1967); Garrison v. Louisiana, supra; Henry v. Collins, 380 U.S. 356 (1965); Rosenblatt v. Baer, 383 U.S. 75, 84 (1966); Greenbelt Cooperative Publishing Ass'n., Inc. v. Bresler, 398 U.S. 6, 9-11 (1970). Additionally, it has been stated that those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. Gertz v. Robert Welsh, Inc., supra, at 342.

The Gertz case, supra, also made clear that the defamatory falsehood referred to in the *New York Times* standard refers to a statement of fact as opposed to pure comment or opinion:

> "We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." (418 U.S. at 339-40)

It thus appears that under the present state of the law concerning an action for libel by a public official, the plaintiff has the burden of showing by clear and convincing evidence that the defamatory statement was (1) a statement of fact, (2) which was false, and (3) made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. We conclude from our examination of the briefs and those portions of the record to which our attention has been directed, that the plaintiff/appellee did not meet that burden as is illustrated by the following sampling of the various articles of which plaintiff complained.

Plaintiff/appellee complained that the defendants characterized his tenure in office as *unsuccessful*, and stated that he was unfit to hold the office of Superintendent of Public

Instruction because of his *ineptness, incompetence* and *indecisiveness*. All of these charges were clearly matters of opinion, not statements of fact, and were proper subject of comment on a public official's fitness for office.

Plaintiff/appellee complained that defendants accused him of *cheating* and *stealing from the public* and that he had his "*fingers in* the pot." A charge of cheating or stealing, if false and made with knowledge of such falsity or with reckless disregard for the truth thereof, would certainly be beyond the constitutional privilege established by the *New York Times* standard. However, in proper context the statements which defendants actually made do not carry the implication suggested by plaintiff. The first article referred to an editorial in which the newspaper asserted that the public and the school board had been *cheated by Mr. Early's lack of leadership*, while the second article stated in an editorial that "Mr. Below sits on the sideline doing what he can when Mr. Early's fingers aren't in the pot"—*implying, not thievery, but incompetent intervention* in the operation of the school system. Taken in proper context, no reader of the newspaper articles could have thought that the newspaper was charging Early with the commission of any criminal offense. Cf. Greenbelt Cooperative Publishing Assn'n., Inc. v. Bresler, supra.

Many of the written articles and cartoons, caustic and pejorative as they were, nonetheless had a basis in fact and thus were not false: defendants reported that the school board had stripped Mr. Early of his power (on that occasion plaintiff had been directed by a majority of the five-member school board to let the Deputy Superintendent, Mr. Below, run the system); defendants described plaintiff, a holder of two Masters Degrees in education, as a "former trucker" (but by Mr. Early's own admission he had at one time worked for a small trucking firm); defendants published an article stating that plaintiff had made improper use of an educational TV system by making a speech to

school employees in which he defended himself against his critics (but such use was contrary to regulation and Mr. Early was criticized in this respect by some members of the school board and by the State Superintendent of Public Instruction); defendants reported that plaintiff planned to fire four hundred members of the instructional staff and a cartoon depicted plaintiff chopping off heads while surrounded by Lizzy Borden, Henry VIII, and Jack the Ripper (but this is more a matter of semantics since, at the school board meeting from which these matters originated, plaintiff had submitted a plan for cutting down by approximately four hundred the number of new teachers to be hired in the next year and at that meeting one of the school board members had himself suggested that the action compared with that of Lizzy Borden, Henry VIII and Jack the Ripper); defendants reported that plaintiff was seeking a position with the federal government (and in fact Mr. Early had submitted an application for such a position).

A series of articles accused plaintiff of nepotism. They dealt with employment of plaintiff's wife, a registered nurse, in the school system. She had been so employed before Mr. Early came to office and thus in this sense the charge was false. However the series of articles relative to this matter were based primarily on information furnished by the then chairman of the school board, who had told defendants that he assumed plaintiff had recommended his wife for the school position since he, the school board chairman, had been informed that the plaintiff's predecessor had not recommended Mrs. Early for her part-time job with the school system. There was no evidence to show that the defendants had accused plaintiff of nepotism with knowledge of the falsity of the charge or with a high degree of awareness of its probable falsity. There was, at the most, only proof of defendants failure to investigate, which without more, cannot establish reckless disregard for the truth. Gertz v. Robert Welsh, Inc., supra, at 332.

Most of the articles and cartoons would fall in the category of what the courts have chosen to call "rhetorical hyperbole" or "the conventional give and take in our economic and political controversies." In this category were statements to the effect that public confidence in the school system was eroding, that the public was clamoring for new leadership in the school system, that plaintiff enjoyed TV and news exposure, that plaintiff had not, prior to his election, held an administrative position in the school system higher than acting principal, and such cartoons as depicted the school buildings falling down or crumbling under plaintiff's leadership, as typical examples.

We do not here attempt to discuss or classify more than a smattering of the several hundred derogatory articles and cartoons which defendants published of and concerning plaintiff. Suffice it to say that while most of the articles and cartoons can fairly be described as slanted, mean, vicious, and substantially below the level of objectivity that one would expect of responsible journalism, there is no evidence called to our attention which clearly and convincingly demonstrates that a single one of the articles was a false statement of fact made with actual malice as defined in the *New York Times* case. We thus conclude that the defendants' motion for a directed verdict at the close of the evidence should have been granted by the trial court. The judgment is therefore reversed and the cause remanded with directions to enter a judgment in favor of the defendants.

REVERSED and REMANDED.

WALDEN, C.J., OWEN, J., and STRAWN, DAVID U., Associate Judge, concur.

APPENDIX D

(Caption Omitted in Printing)

June 2, 1976

Ordered that the Appellee's May 7, 1976 Petition for Rehearing and Motion to Certify Question as Being of Great Public Interest is hereby denied.

A True Copy

/s/ Emmett J. Comiskey
Emmett J. Comiskey
Clerk

APPENDIX E

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY.

No. 71-10447—Wehle

Lloyd F. Early, *Plaintiff*,

vs.

Palm Beach Newspapers, Inc., a Florida corporation, Gregory E. Favre, R. H. Kirkpatrick, Tom Sawyer and Jane Arpe, *Defendants*.

Final Judgment for Plaintiff

Pursuant to the verdict rendered in this action,

It Is Adjudged that the Plaintiff, Lloyd F. Early, recovers from the Defendants, Palm Beach Newspapers, Inc., Gregory E. Favre, R. H. Kirkpatrick, Tom Sawyer and Jane Arpe, the sum of $950,000.00 as compensatory damages, and that the Plaintiff, Lloyd F. Early, recovers from the Defendant, Gregory E. Favre, the sum of $25,000.00 as punitive damages, and that the Plaintiff, Lloyd F. Early, recovers from the Defendant, R. H. Kirkpatrick, the sum of $25,000.00 as punitive damages, besides his costs in his behalf expended, to be taxed by special order of the Court. Execution is withheld until time has expired for filing motion for new trial or a motion for new trial has been ruled upon.

Ordered this the 28th day of August, A. D., 1974.

/s/ Victor O. Wehle
Circuit Judge

APPENDIX F

(Caption Omitted in Printing)

Order Denying Defendants' Motion for Mistrial and Motion for Judgment Notwithstanding Verdict or in the Alternative for New Trial, and Plaintiff's Motion to Strike

This Cause came on to be heard on the post-trial motions of the Defendants after Verdict and Final Judgment have been entered for the Plaintiff. The Defendants have filed with this Court a Motion for Mistrial and a Motion for Judgment Notwithstanding Verdict or in the Alternative for New Trial. The Plaintiffs have filed a Motion to Strike Defendants' Post-Trial Motions. The Court has heard argument of counsel and after having carefully studied very comprehensive and scholarly briefs provided by all counsel, and being fully advised in the premises, the Court finds:

1. The Plaintiff's Motion to Strike is without merit.

2. With reference to the Motion for Mistrial, there has been no showing of any prejudicial error.

3. With reference to the Motion for Judgment Notwithstanding Verdict or in the Alternative for New Trial, the Court finds that the jury was properly instructed relative to the Defendants' privilege under the doctrine enunciated in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) and its progency of cases. The Court further finds that the Plaintiff carried his burden of proof under the *New York Times* standard and proved his case by the clear and convincing weight of the evidence. There is ample evidence in the record from which the jury could reasonably conclude that the Defendants clearly engaged in a campaign to "get" the Plaintiff. There was sufficient and substantial evidence from which a jury could reasonably conclude that many of their articles were published knowing of their falsity or with a high degree of awareness of their probable falsity.

The New York Times and succeeding cases have placed a tremendous burden upon any public figure who claims a cause of action for libel. If the protective umbrella of the New York Times and succeeding cases extends over Defendants who have acted as have the Defendants in this cause, I would have to conclude that public officials are completely barred from successful libel actions. I cannot and will not accept this unless and until an Appellate Court so directs. The Defendants' attorneys, in both their briefs and their oral argument, have frequently quoted the well-known saying of the late Persident Truman with reference to politicians and their sensitivity to criticism, "If you can't stand the heat, stay out of the kitchen". Certainly, public figures must inure themselves to a reasonable amount of heat. However, a Defendant cannot set fire to a building and then claim that the cook has no right to complain of the heat.

4. The Court further finds that the alleged non-constitutional basis for an award of a new trial are without merit.

Thereupon It Is Ordered and Adjudged:

1. The Defendants' Motion for Mistrial is denied.

2. The Defendants' Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial is denied.

3. The Plaintiff's Motion to Strike Defendants' Post-Trial Motions is denied.

Done and Ordered this the 19th day of November. A.D. 1974.

/s/ Victor C. Wehle
Circuit Judge

In the Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1649

LLOYD F. EARLY,
Petitioner,

vs.

PALM BEACH NEWSPAPERS, INC., et al.,
Respondents.

ON PETITION FOR CERTIORARI TO THE DISTRICT COURT
OF APPEAL, STATE OF FLORIDA,
FOURTH JUDICIAL DISTRICT

REPLY BRIEF OF RESPONDENTS

HAROLD B. WAHL
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Telephone: 904/353-7329
Attorneys for Respondents

June, 1978

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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In the Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1649

LLOYD F. EARLY,
Petitioner,
vs.
PALM BEACH NEWSPAPERS, INC., et al.,
Respondents.

ON PETITION FOR CERTIORARI TO THE DISTRICT COURT OF APPEAL, STATE OF FLORIDA, FOURTH JUDICIAL DISTRICT

REPLY BRIEF OF RESPONDENTS

INTRODUCTION

While the Petition is entitled "to the District Court of Appeal", yet the opening sentence of the Petition shows that it is to *review* the "decision below of the *Supreme Court* of Florida". While it is true that one of the six judges of the Florida Supreme Court dissented, yet that

court held simply (Petitioner's Appendix A) that the Florida Supreme Court "is without jurisdiction and therefore the Petition is denied". The one judge dissent was on jurisdiction. Accordingly, the Petition here is erroneously addressed to the Supreme Court of Florida and should be addressed to the District Court of Appeal. We quote from Supreme Court Practice, Stern and Gressman, Section 3.22:

> "Should the higher court decline to exercise its authority, the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable under §1257. Sullivan v. Texas, 207 U.S. 416; American Ry. Exp. Co. v. Levee, 263 U.S. 19, 20-21; Hammerstein v. Superior Court, 341 U.S. 491, 492; Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 160; Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 678, n. 1."

It appears that even with the extension granted by Mr. Justice Powell, the Petition has not been properly filed; the opening paragraph of the Petition specifically states that it is to *"review"* the "decision below of the *Supreme Court of Florida*".

OPINIONS BELOW

The order of the Supreme Court of Florida holding that it was without jurisdiction, and the order denying rehearing thereon, are reported at 354 So.2d 351, and at 3 Media Law Reporter 2183. The opinion of the Fourth District Court of Appeal which should have been sought to be reviewed here is reported at 334 So.2d 50.

JURISDICTION

There is no jurisdiction in the United States Supreme Court here; review is merely sought of an order denying review for lack of jurisdiction by the Supreme Court of Florida. The fact that one of the six judges dissented does not convert the order denying jurisdiction into an appealable final judgment.

QUESTION PRESENTED

Contrary to Petitioner, the opinion of the District Court of Appeal squarely cited and followed the decisions of this court in *New York Times* v. *Sullivan,* (1964) 376 U.S. 254 and succeeding cases, and did *not* unconstitutionally deprive Petitioner of due process of law. The question presented is whether this court shall abandon and overrule the *New York Times* cases, including *Gertz* v. *Welch,* (1974) 418 U.S. 323; *Old Dominion Letter Carriers* v. *Austin,* (1974) 418 U.S. 264; *Greenbelt* v. *Bresler,* (1970) 398 U.S. 6; et al.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . .

United States Constitution, Amendment XIV, Section 1:

> . . . Nor shall any state deprive any person of life, liberty or property, without due process of law. . . .

STATEMENT

Petitioner County Superintendent Early brought a suit in the Florida state court for libel. As stated by the District Court of Appeal (Petitioner's Appendix C), 334 So.2d 50, at 53, "there is no evidence called to our attention which clearly and convincingly demonstrates that a single one of the articles was a false statement of fact made with actual malice as defined in the *New York Times* case. We thus conclude that the defendants' motion for a directed verdict at the close of the evidence should have been granted by the trial court. The judgment is therefore reversed and the cause remanded with directions to enter a judgment in favor of the defendants."

Far from misapplying the standard of *New York Times,* the District Court of Appeal cited and squarely followed the decisions of this court in *New York Times,* supra; *Garrison* v. *Louisiana,* (1964) 379 U.S. 64; *Gertz* v. *Welch,* (1974) 418 U.S. 323; *St. Amant* v. *Thompson,* (1968) 390 U.S. 727; *Beckley Newspaper Corp.* v. *Hanks,* (1967) 389 U.S. 81; *Rosenblatt* v. *Baer,* (1966) 383 U.S. 75; and *Greenbelt* v. *Bresler,* (1970) 398 U.S. 6. The trial court, as held by the Florida appellate court, erroneously submitted the case to the jury. Under the *New York Times* doctrine there was *no* proof that Respondents made a publication which they either knew to be false or about which they had serious doubts as to truth; let alone proof of convincing clarity.

Far from refusing to apply *New York Times,* the Florida appellate court has squarely followed the *New York Times* cases. Even the one Florida Supreme Court judge, who dissented on the question of jurisdiction, did not dissent on the basis on which certiorari is sought here. He

dissented solely on the basis of *Florida* cases which he, contrary to the other five members of the court, felt required a jury trial. It is significant that the one dissenting judge does not cite a single decision of this court which he thought justified his dissent but relied entirely on Florida cases.

It is also significant that only one of the nine appellate judges who considered the question agreed with the trial judge. All three judges of the District Court of Appeal agreed in reversing the trial judge, and five of the six judges of the Florida Supreme Court refused to review that decision.

THE REASONS WHY THE WRIT SHOULD NOT BE GRANTED

In the first place, as above indicated, there is no jurisdiction here for the Petition. Petitioner seeks certiorari to *review* the order of the Florida Supreme Court holding it had no jurisdiction; as distinguished from seeking to review the decision of the intermediate Florida appellate court which was the highest Florida court in which decision could be had.

Secondly, the decision of the Florida court, far from being at variance with the letter and spirit of the *New York Times* doctrine, squarely follows it. We quote from the opinion of the District Court of Appeal, 334 So.2d 50 at page 52, found at pages 10a and 11a of Petitioner's Appendix C, where after citing the *New York Times* cases, the court said:

> ". . . Additionally, it has been stated that those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the

defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. Gertz v. Robert Welch, Inc., (1974) 418 U.S. 323, at 342.

The Gertz case, supra, also made clear that the defamatory falsehood referred to in the New York times standard refers to *a statement of fact as opposed to pure comment or opinion*:

> 'We begin with the common ground. Under the First Amendment *there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.* But there is no constitutional value in false statements of fact.' (418 U.S. at 339-40)

It thus appears that under the present state of the law concerning an action for libel by a public official, the plaintiff has the burden of showing by clear and convincing evidence that the defamatory statement was (1) a statement of fact, (2) which was false, and (3) made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. We conclude from our examination of the briefs and those portions of the record to which our attention has been directed, that the plaintiff/appellee did not meet that burden as is illustrated by the following sample of the various articles of which plaintiff complained.

Plaintiff/appellee complained that the defendants characterized his tenure in office as unsuccessful, and stated that he was unfit to hold the office of Superintendent of Public Instruction because of his ineptness, incompetence and indecisiveness. All of these charges

were clearly matters of opinion, not statements of fact, and were proper subject of comment on a public official's fitness for office.

Plaintiff/appellee complained that defendants accused him of cheating and stealing from the public and that he had his 'fingers in the pot.' A charge of cheating or stealing, if false and made with knowledge of such falsity or with reckless disregard for the truth thereof, would certainly be beyond the constitutional privilege established by the New York Times standard. However, in proper context the statements which defendants actually made do not carry the implication suggested by plaintiff. The first article referred to an editorial in which the newspaper asserted that the public and the school board has been cheated by Mr. Early's lack of leadership, while the second article stated in an editorial that 'Mr. Below sits on the sideline doing what he can when Mr. Early's fingers aren't in the pot'—implying, not thievery, but incompetent intervention in the operation of the school system. Taken in proper context, no reader of the newspaper articles could have thought that the newspaper was charging Early with the commission of any criminal offense. Cf. Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, supra.

> Many of the written articles and cartoons, caustic and pejorative as they were, nonetheless had a basis in fact and thus were not false . . ."

Again on page 13a (page 53 of 334 So.2d):

> "Most of the articles and cartoons would fall in the category of what the courts have chosen to call *'rhetorical hyperbole'* or 'the *conventional give and take in our economic and political controversies.'*"

(Italics here and elsewhere added unless otherwise indicated.)

Gertz makes it abundantly clear that "Under the First Amendment there is no such thing as a false idea" and that "however pernicious an opinion may seem" that is not a basis for a cause of action for libel under *New York Times*. It is this square holding of *Gertz* which the Petitioner seeks to overturn.

And when the court stated the rule in *Gertz*, it added as footnote 8 (418 U.S. at 340):

> "8. As Thomas Jefferson made the point in his first Inaugural Address: 'If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which *error of opinion may be tolerated* where reason is left free to combat it.'"

Right to Have and Express an Opinion

The Respondents had a perfect right to have and publish the opinion that the Petitioner elected public official was inept, that he lacked leadership, that he was indecisive, and that he was incompetent. The opinion of the District Court of Appeal (334 So.2d 50), Petitioner's Appendix C, points out the justifiable basis for the opinion. To say that there was no basis for the opinion is absurd. These charges were made at Board meetings by members of the Board and the public. (See Admissions of Petitioner on cross-examination at T.155-161). Petitioner himself admitted that a majority of the Board jointly told him to "step out of the way and let Mr. Below [Deputy Superintendent] run the show". (T.161). The Respondents are entitled under the First Amendment to express their opinion. This court denied certiorari at 410 U.S. 984 from the

Florida decision of *Gibson* v. *Maloney*, (Fla. D.C.A. 1, 1972) 263 So.2d 632, where at page 637 the right to express an opinion was squarely set forth. There was no showing, let alone proof of convincing clarity, that Respondents here did not have a good faith belief in their opinion.

There is no such thing as a false idea. See *Gertz* v. *Welch*, 418 U.S. at 339-40. If the Respondents had the opinion that Petitioner Early was inept, lacked leadership, was indecisive and incompetent, and they had that idea, they had a perfect right under *Gertz* and *Old Dominion*, supra, to express and reexpress such idea and opinion.

Petitioner complained of the alleged publication that he was a "figurehead". Here again Respondents were entitled to have and publish this opinion especially since it was also expressed and shared by members of the School Board. This is mild criticism compared to that permitted by the *New York Times* cases.

Petitioner complained because the Respondents quoted School Board member McKay who was an "unwavering foe" of the Petitioner. It is not uncommon for an official to be an unwavering foe of his opponent. It cannot be *New York Times* libel to quote fairly public statements of one public official about another public official whom he considers to be incompetent.

Compare the pre-*New York Times* case of *Abram* v. *Odham*, (Fla. 1956) 89 So.2d 334, where at page 337 the Florida Supreme Court quoted Federal cases and said of news criticism by one public figure of another:

> "It is unthinkable that newspapers should not be allowed to give publicity to the matter without fear of being held to liability therefor in a libel suit".

Compare also what this court said in *Bresler*, supra, as to the "legitimate functions of a newspaper" to publish full reports of debates at public meetings of elected officials.

The whole purpose of the *New York Times* doctrine is to permit violent and at times antagonistic comment on public matters, as pointed out in *Garrison* v. *Louisiana*, (1964) 379 U.S. 64. The Respondents had a perfect right to try to "get" a public official whom they honestly considered to be incompetent and unfit for office, and to use rhetorical hyperbole against him.

As stated in *New York Times*, at 376 U.S. 270, "vehement, caustic and sometimes unpleasantly sharp attack" on public officials is the norm.

And as stated in *Garrison* at 379 U.S. 73:

> "Even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."

Garrison goes on to emphasize that even "ill-will, hatred and intent to harm" are not enough. There must be intent to harm through falsehood. See also *St. Amant*, supra.

Just as in *Ocala Star-Banner*, (1971) 401 U.S. 295 [summary judgment thereafter upheld at 263 So.2d 291 (Fla. D.C.A. 1, 1972)] there is *no* "proof of convincing clarity of calculated falsehood with intent to harm through falsehood to get to the jury".

There was probably sufficient evidence to get a negligence case to the jury at the trial below, *had* it been a case where ordinary negligence standards applied. However, it was not enough evidence to get to the jury under the *New York Times* standard of convincing proof of a

false statement of fact with intent to harm through falsehood.

Here the Respondents had a perfect right to try to get a public official they seriously believed was incompetent and should be replaced (in which belief they were joined by a majority of the School Board and thousands of other people).

There is no proof of convincing clarity that they were out to get him through calculated falsehood. As a matter of fact, under the broad standards of *New York Times*, there is no libel at all here against this elected public official.

If plaintiffs can be charged with "blackmail", *Greenbelt*, supra, 398 U.S. at 11, 14, 15; with being a "traitor", *Old Dominion Letter Carriers*, supra, 418 U.S. 264; with being a "bastard", *Curtis* v. *Birdsong*, (C.A. 5, 1966) 360 F.2d 344 at 348; and with being "destroyed", *Time* v. *Johnston*, (C.A. 4, 1971) 448 F.2d 378 at 384; and all of those charges are merely "rhetorical hyperbole" and the "conventional give and take in our political controversies" how can it possibly be said that the much more innocuous language used here is libelous under *New York Times*.

We repeat that the Respondents had the honest opinion that the elected School Superintendent was incompetent, and they had every right to express that opinion and try to get rid of him.

Editorial Control and Judgment

In *Miami Herald* v. *Tornillo*, 418 U.S. 241, at 258, in striking down Florida's Right to Reply Statute this court stated again:

> "Treatment of public issues and public officials *whether fair or unfair*—constitutes the *exercise of edi-*

torial control and judgment. It is yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved at this time."

Mr. Justice White in his concurring opinion, at page 260, emphasized:

"Of course the press *is not always accurate,* or even responsible, and may *not* represent full and fair debate on important public issues, but the balance struck by the First Amendment with respect to the press is that society must take the *risk* * * * we have never thought that the First Amendment permitted public officials to dictate to the press the contents of its news columns or the *slant* of its editorials."[1]

(Parenthetically, if elected superintendent Early may recover here, then certainly he has been able to dictate to the press the contents of its news columns and/or the *slant* of its editorials.)

In *Old Dominion Letter Carriers* v. *Austin,* (1974) 418 U.S. 264, the Court held that the *New York Times* standards applied even to a libel action against a union "during a continuing organizational drive." It overruled application of state libel law. As there stated at page 283, the "federal law gives a union license to use *intemperate, abusive or insulting language* without fear of restraint or

1. The writer stated in amicus curiae brief filed in this Court in *Miami Herald,* **supra**:

"It is essential for the people to know what goes on, particularly in the political field. But if every time a news story is published on a political matter the newspaper has to worry about a lawsuit or a criminal charge much news will not be published and the public will be deprived of its right to know."

penalty if it believes such *rhetoric* to be an effective means to make its point," following the *New York Times* cases, and specifically applying *New York Times.* The *Old Dominion* case was decided under *New York Times* law.

The Court went on to say, at 284, that "the use of words like 'traitor' cannot be construed as representations of fact * * * to use loose language or undefined slogans that are part of the conventional give and take in our economic and political controversies—like 'unfair' or 'fascist' —is not to falsify facts * * * Here, too, *there is no such thing as a false idea.* However pernicious an opinion may be, we depend for its correction not on the consciences of judges and juries but on the competition of other ideas. *Gertz* v. *Welch,* 418 U.S. 323."

It will be observed that *Old Dominion* squarely *cites and follows* the holding of *Gertz* that there is no such thing as a false idea and that however pernicious an opinion may be a libel suit is not the correction therefor.

The opinion in *Old Dominion* then, at page 284, cited *Greenbelt* v. *Bresler,* (1970) 398 U.S. 6, at 14, where the court reversed a libel judgment referring to "blackmail," holding that the "word was no more than *rhetorical hyperbole, a vigorous epithet* used by those who considered Bresler's negotiating position extremely unreasonable."

And so here the language used by the Respondents, and claimed by the public official to be libelous, is at most "rhetorical hyperbole" or a "vigorous epithet" believed by the publisher to be "an effective means to make its point."

Even if the Respondents "misinterpreted" actions or documents, that is "not enough to create a jury issue" as to constitutional malice in the case of a public official. *Time* v. *Pape,* (1971) 401 U.S. 279, at 290, 291.

In *Old Dominion*, the Court at page 281 followed *New York Times* and reversed, saying: "Instructions which *permit* a jury to impose liability on the basis of the defendants' hatred, spite, ill will, or desire to injure are 'clearly impermissible' * * * *Ill will toward the plaintiff, or bad motives, are not elements of the New York Times standards.*"

In *Linn* v. *Plant Guard Local*, (1966) 383 U.S. 53, the Supreme Court had considered the right of free speech in union matters and expressly adopted the *New York Times* standard. This was followed in *Old Dominion*, where at 281 the court said:

> "The Linn Court explicitly *adopted the standards of New York Times Co.* v. *Sullivan*, 376 U.S. 254, and the heart of the New York Times test is the requirement that recovery can be permitted only if the defamatory publication was made 'with knowledge that it was false or with reckless disregard of whether it was false or not * * *'
>
> It is therefore clear that the libel judgments in this case must be reversed * * * the court has often recognized that in cases involving *free expression* we have the obligation not only to formulate principles capable of general application, but also to *review the facts* to insure that the *speech involved* is not protected under federal law. (Citing New York Times, Greenbelt, et al.)."

In *Old Dominion*, at 272, the court went on to say that labor controversies (*like politics*)

> "are frequently characterized by *bitter and extreme* charges, counter charges, unfounded rumors, *vituperations*, personal *accusations*, *misrepresentations* and

distortions. Both labor and *management often speak* bluntly and embellish their respective positions with imprecatory language."

The court upheld

> "this freewheeling use of the written and spoken word * * * to encourage free debate * * * and in order to prevent unwarranted intrusion upon *free discussion* * * * *The Court therefore found it appropriate to adopt by analogy the standards of New York Times* * * * Accordingly we held that libel actions under state law were pre-empted by the federal labor laws to the extent that the state sought to make actionable defamatory statements in labor disputes which were published without knowledge of their falsity or reckless disregard for the truth."

Since these are the standards of *New York Times*, they are applicable to criticisms of County Public School Superintendent Early here. The Court in *Old Dominion*, at 284-285, expressly referred to such "loose language" as part of the conventional give-and-take in our economic and *political* controversies.[2] *Linn* has been cited many times in the succeeding *New York Times* cases, and *Old Dominion*, citing *Linn* and *Gertz*, was set for oral argument along with *Gertz*.

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2. As stated in *Time* v. *Johnston*, (C.A. 4, 1971) 448 F.2d at 384:

> "To deny the press the right to use *hyperbole*, under the threat of removing the protective mantle of New York Times, would condemn the press to arid, desiccated recital of bare facts. Just as was plain in *Greenbelt* v. *Bresler*, (1970), 398 U.S. at p. 14, that the term 'blackmail' was mere hyperbole and did not charge the commission of a criminal offense, and similarly that the word 'bastard' in *Curtis* v. *Birdsong*, (C.A. 5, 1966) 360 F.2d 344, 348, was not intended to charge the highway patrolman with 'having been born out of wedlock,' so the phrases here were hyperbole so that 'destroyed' did not mean plaintiff had 'literally' been destroyed."

Free Discussion

This Court in *Miami Herald,* supra, 418 U.S. at 259, followed an earlier opinion and said:

> "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the *free discussion* of governmental affairs.[3] This, of course, includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a *powerful antidote* to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials selected by the people responsible to all the people whom they were elected to serve. Suppression of the right of the press to praise or *criticize governmental agents* and to *clamor or contend for or against change . . . muzzles* one of the very agencies the framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it *free.*" *Mills* v. *Alabama* (1966) 384 U.S. 214 at 218-219.

The defendants here did just what the Supreme Court has repeatedly said they should do, whether it be by "criticism", or "clamor for change", or "rhetorical hyperbole" or "vigorous epithet" or "intemperate, abusive or insulting language, believing such rhetoric to be an effective means to make its point."

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3. This same language was quoted and followed on May 1, 1978, in *Landmark Communications* v. *Virginia,* ..... U.S. .....

> "Mere words of vituperation and abuse are not of themselves actionable and libelous." *Curtis* v. *Birdsong,* (C.A. 5, 1966) 360 F.2d 344.

This court further held in *Virginia State Board of Pharmacy* v. *Virginia Citizens Council,* (1976) 425 U.S. 748, and *Linmark* v. *Township,* (1977) 431 U.S. 85, that First Amendment protection was afforded to the dissemination of commercial information.

If First Amendment protection is thus given to commercial advertising, how much more does the First Amendment protect the public's right to know, and the right of the press to publish, what goes on with respect to an elected county School Superintendent.

Cox Broadcasting v. *Cohn,* (1964) 420 U.S. 469, at 496, emphasizes the right of the news media to publish matters of public interest, especially when they are in the public records, "even though offensive to the sensibilities of the supposed reasonable man". Any other course "would invite timidity and self-censorship and very likely lead to the suppression of many ideas which would otherwise be published and that should be available to the public—*Reliance must rest upon the judgment of those who decide what to publish or broadcast.*"

This court in *Nebraska Press* v. *Stuart,* (1976) 427 U.S. 539, unanimously upheld the First Amendment protection of the press. The court held unconstitutional an attempt to impose gag orders against publication of what went on in criminal trials. This was on the theory that the people have a "right to know" what goes on in matters of public interest just as they had a right to know about elected Superintendent Early. This court unanimously rejected the ruling of the Nebraska court that the First

Amendment rights of the news media had to be sacrificed "to preserve the defendant's rights". The same thing applied to Petitioner. Far from there being conflict with established law in the opinion of the Florida appellate court, such law is bottomed squarely on the *New York Times* cases.

We respectfully refer the court to the *dissenting* opinion of Mr. Justice Fortas in *St. Amant*, supra, 390 U.S. 727 at 734-735, to show just how far the majority opinion went and why there is no merit to Petitioner's Petition here.

This court as late as May 1, 1978, said in *Landmark Communications* v. *Virginia*, ... U.S. .....;

> "Our prior cases have firmly established, however, that injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.' New York Times v. Sullivan, 376 U.S. at 272-273. See also Garrison v. Louisiana, 379 U.S. 64, 67. The remaining interest sought to be protected, the institutional reputation of the courts, is entitled to no greater weight in the constitutional scales. See New York Times v. Sullivan, supra."

CONCLUSION

We are interested to observe that the Petitioner "agrees with the trial judge". Unfortunately the trial judge was not in accord with *New York Times*.

Petitioner, as we understand it, now asks the court to recede from its prior *New York Times* opinions including the *Gertz, Old Dominion Letter Carriers, Garrison* and *Bresler* opinions.

Gertz is still the law in stating, as theretofore stated by Thomas Jefferson, and as expressly followed by *Old Dominion*:

> "There is no such thing as a false idea. However pernicious an opinion may be, we depend for its correction not on the consciences of judges and juries but on the competition of other ideas."

Moreover, as held in *Bresler, New York Times, Old Dominion,* et al., and followed by the Florida District Court of Appeal here, the alleged libel was no more than "rhetorical hyperbole" or the "conventional give and take in our economic and political controversies".

However ingenious and seemingly plausible the argument of his counsel may be, Petitioner asks too much. The Writ of Certiorari should be denied.

Respectfully submitted,

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June, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1649

LLOYD F. EARLY,
Petitioner

v.

PALM BEACH NEWSPAPERS, INC., GREGORY E. FAVRE, ROBERT H. KIRKPATRICK, JANE ARPE AND TOM SAWYER,
Respondents

On Petition for a Writ of Certiorari to the District Court of Appeal for the State of Florida, Fourth Judicial District

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REPLY BRIEF OF PETITIONER

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Dated: September 13, 1978

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REPLY BRIEF OF PETITIONER

I.

INTRODUCTION

Respondents emphasize that although the Petition for a Writ of Certiorari (filed with this Court May 20, 1978) was properly titled, it was nevertheless "erroneously addressed to the Supreme Court of Florida" in the first sentence "and should [have been] addressed to the [Florida] District Court of Appeals." Reply Brief of

Respondents, p.2 (June, 1978). It was, however, the State's Supreme Court which rendered the most recent, final decision. On the heels of that decision, we now respectfully request this Court to take such action which it sees fit to redress the effect of the erroneous decision of the court below. We ask first that this Court grant the Petition for a Writ of Certiorari, review the instant proceeding on the merits, reverse the decision of the Florida District Court of Appeal, and reinstate the judgment and jury verdict of the trial court. In the alternative, Petitioner requests that this Court, after granting a writ of certiorari, remand this action to the Florida District Court of Appeal for reconsideration in the light of arguments presented in the pending Petition for Certiorari. Finally, we respectfully ask that this Court grant the Petition for Certiorari and remand to the Florida Supreme Court, ordering it to take jurisdiction of the instant action. It was to this end that Petitioner "addressed" the petition to that court.

The Petition for a Writ of Certiorari was in response to the final judgment of the Florida Supreme Court, although this Honorable Court well knows that the above-described avenues of review lay open to it should it grant certiorari and review the instant proceeding. For Respondents to protest so vigorously such a slight deviation from standard practice, one barely rising to the level of "procedural," is to prefer form over substance in an attempt to deflect this Court's attention from the crucial issues in this action. We urge this Court to address the issues and not become diverted by the needless injection of this defense into the present action by Respondents.

Should this Court require the Petition for a Writ of Certiorari expressly to state that it is "to review the decision of the Florida District Court of Appeal, Fourth District" (as it does in the title) rather than of the court immediately below we urge the Court to consider this

section of this Reply as a request either to amend the words on page one of said Petition to so read, or for the Honorable Justices of this Court simply to read them as such in granting the petition before them.

II.

ARGUMENT

The Florida District Court of Appeal erred in reversing the judgment of the trial court and jury verdict for Petitioner. It utterly misinterpreted and to an astonishing degree ignored the evidence indicating actual malice (as defined by *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710 [1964] and expanded upon by subsequent decisions) on the part of Respondents in waging their campaign to have Petitioner removed from office. Even assuming there was no more evidence to that effect than was cited by the District Court of Appeal in its decision, the court nonetheless erred in substituting its evaluation of that evidence for that of the trial court.

The District Court of Appeal examined a mere "smattering" of the many articles introduced at trial. Petition for a Writ of Certiorari, App. c at 13a. Careful scrutiny of those articles and their personal observation of witnesses lead the jury to award Petitioner both compensatory *and punitive* damages. The trial judge, similarly privileged to see and hear first hand the articles and testimony relating thereto, noted that if these Respondents bore the protection of *New York Times* v. *Sullivan*, *supra*, "public officials [would be] completely barred from successful libel actions." *Id.*, p. 15 (May 20, 1978). It is, therefore, difficult to fathom the District Court of Appeal's finding that "no reader of the newspaper articles could have thought that the newspaper was charging Early with the commission of any criminal offense." *Id.*, App. C. at 11a. Innumerable cases have reminded that "it is not the province of the District

Court of Appeal to substitute its judgment for that of the trier of facts." *Littel* v. *Hunnicutt*, 310 So. 2d 45 (1975). Yet the appeals court found that, "in the light most favorable to the verdict," *Cape Publications, Inc.* v. *Adams*, —— So. 2d —— (Fla. 4th DCA, August 27, 1976), no evidence existed to show either that the published statements were defamatory or that they were made with "actual malice." Without recounting the evidence of the charge of nepotism (*see* Petition for a Writ of Certiorari, p. 14), we respectfully offer that article as but one example of the legion of articles justifiably found by the trial court to be published with reckless disregard of their truth or falsity, or with knowledge that they contained falsehoods. To allow the District Court of Appeal to presumptiously jettison the trial court's reasoned decision for its own ill-considered one would be a drastic setback to our orderly judicial process and, in this case, to the careful substantive evolution of the cases interpreting *New York Times* v. *Sullivan*. Procedurally then, the court below erred; its decision should be reversed here, or the case remanded to either appellate court below for reconsideration.

On the merits alone, this Court could also reverse the District Court of Appeal decision. The opinion of this Court in *New York Times* v. *Sullivan, supra*, was directed at precisely the type of malicious and libelous course of publication practiced by Respondents. While reaffirming the press' First Amendment right to report the news and engage in admittedly biased, often violent and at times antagonistic comment on public matters, *Garrison* v. *Louisiana*, 379 U.S. 64, 85 S.Ct. 209 (1964), the Court in *Sullivan* held the news media responsible for defamatory statements concerning a public official where "the statement[s] [were] made with 'actual malice'—that is, with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." (376 U.S. 254, 279-80, 84 S.Ct. 710, 726 [1964]).

The Court, in *New York Times* v. *Sullivan, supra*, and in numerous subsequent cases, has at no time distinguished between editorial opinion and factual news reporting in applying the standard it propounded. *Any* defamatory falsehood relating to a public official, published with knowledge of its falsity or with serious doubts as to its truth, *St. Amant* v. *Thompson*, 390 U.S. 727, 88 S.Ct. 1323 (1968), whether reported as news or couched in editorial commentary, meets the "actual malice" test for actionable libel set forth in *Sullivan*. Respondents, however, hide behind the unfounded contention that all of their publications are absolutely privileged inasmuch as many (although admittedly not all) of the articles are editorials or editorial cartoons, representing only the opinion of the publishers, thereby allegedly rendering them immune from attack as factually untrue. The irrelevance of any distinction between factual reporting and published opinion where both are pursued with "actual malice" has been emphasized consistently by this Court. "All discussion and communication involving matters of public and general concern" must satisfy the criteria announced in *New York Times* v. *Sullivan, supra*. *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 44, 91 S.Ct. 1811, 1820 (1971).

We ask this Court to grant the Petition for Certiorari and review the numerous news articles, editorials, editorial cartoons, and "news articles" carrying editorial messages which were published in a ruthless attempt to oust Petitioner from office. During this onslaught, Respondents advanced facts they knew to be false, and evidenced a reckless disregard of the truth or falsity of many other printed allegations. *See*, Petition for a Writ of Certiorari, p.14 n.2. Yet the court below, after perusing only a "smattering" (*Id.*, App. C. at 13a) of the many articles which the trial court jury fund to evidence actual malice, declared that "these charges were clearly matters of opinion, not statements of fact." *Id.* at 11a. The

Florida District Court of Appeal apparently ignored its own finding that many of the articles were "news articles" (*Id.* at 8a). Even if we assume, *arguendo*, that the news articles contained editorial opinions, they nonetheless should not be afforded protection if those opinions are based upon, and interspersed with factual reports which, through calculated falsehood or reckless unconcern as to their truth or falsity, are designed to paint a false or tainted picture of the official, *see Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 95 S.Ct. 465 (1974); *Varnish* v. *Best Median Publishing Co.*, 405 F. 2d 608, 611-12 (2d Cir. 1968), *cert. denied*, 394 U.S. 987, 89 S.Ct. 1465 (1969), or malign the character of the official through false innuendo and accusation made with actual malice, *see Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 87 S.Ct. 1975 (1967). In short, to insulate from liability Respondents' libelous campaign against Petitioner by simply labelling *some* of the articles "editorials" and thereby somehow affording *all* the articles (although all were not even read by the court) absolute immunity is to stand the well-established theory of *New York Times* v. *Sullivan* and its progeny on its head. While editorial opinion is one of the chief benefactors of the First Amendment freedom of the press, (". . . there is no such thing as a false idea," *see Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339, 94 S.Ct. 2997 [1974]), false statements made with actual malice, while masquerading as, or forming the basis of editorial opinions, do not warrant constitutional protection. Respondents in effect advance a "right to fabricate" behind the First Amendment shield of the public's "right to know." This advance must be halted.

The court below erred gravely in holding that "many of the written articles and cartoons, caustic and pejorative as they were, nonetheless had a basis in fact and thus were not false . . ." Petition for a Writ of Certiorari, App. C, at 11a. The Florida District Court of Appeal thereby indicated that as long as it contains some

modicum of truth, an entire article will be deemed automatically devoid of falsehood. It is not difficult to discover articles, judicially declared to be libelous, which are free from defamatory statements except for one isolated phrase or sentence. The court cannot ignore the libelous remark any more than a reader is likely to, nor may it base its decision on the ratio of truths to falsehoods contained in the article. The court's finding that any article with any "basis in fact" cannot be false in any way is clearly erroneous and must be either remanded for review below or reversed by this Honorable Court.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted and the decision of the Florida District Court of Appeal reversed, or in the alternative, the case remanded either to the Florida District Court of Appeal for reconsideration in the light of said Petition, or to the Florida Supreme Court with orders to take jurisdiction of the action.

Respectfully submitted,

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